NOVATION.[1]

WHENEVER there is a change in one of the parties, or in the form of an obligation the substance of which remains the same, there is said to be a novation. We have borrowed the name from the Roman law, but the institution itself is of native growth. Novation in the Roman law was effected by the *stipulatio*. But we have nothing in our law corresponding to the Roman stipulation. Novation, by a change in the form of the obligation, as by the substitution of a specialty for a simple contract, has existed in English law from time immemorial under the name of merger. But our novation by a change of parties, whether by the intervention of a new creditor (*novatio nominis*) or by the substitution of a new debtor (*novatio debiti*), is a modern institution. The earliest judicial recognition of the doctrine seems to be the oft-quoted opinion of Mr. Justice Buller in 1759: —

"Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover the sum against A."

That this doctrine had no place in the ancient common law appears clearly from the following case of the year 1432: —

"*Rolf.* In case B is indebted to C in £20, and A buys a chattel of B for £20, so that A is his debtor for so much; if A comes and shows C how B is indebted to C in £20, and how A is indebted to B in £20 by reason of the purchase, and A grants to C to pay C the £20 which A owes, and that B shall be discharged of his debt to C, and C agrees to this, and B also, A shall now be charged to C for this debt by his contract and own act.

"*Quod* COTESMERE, J., *negavit*, and said, although all three were of one accord that A should pay the money to C, this is only a *nudum pactum*, so that for this C cannot have an action.

"*Rolf.* I say this is not a *pactum nudum*, but *pactum vestitum*, for there was a contract between B and C, and also between A and B, so that this accord between them is not *pactum nudum*. But when I grant to pay a

[1] The writer desires to acknowledge his obligations to Mr. Edmund A. Whitman, whose article on Novation in 16 Am. and Eng. Encyc. of Law, 862, is, by far, the most valuable essay upon the subject in our language.

certain sum to a man, or when I grant to pay the duty of another to whom I am not indebted, that is *pactum nudum*, because in the first case there is no contract, and in the last case there is no contract or duty between me and him for whom I grant to pay, so that for this he cannot have an action. But in my case there is a contract by the duty between A and B for whom A grants, and between B and C to whom A grants, to pay the debt. So *pactum vestitum*, for which he shall have an action, wherefore, etc.

"COTESMERE, J. It is *nudum pactum* in both cases, for although all three are agreed that A shall pay this debt for B, still B is not discharged of his debt in any manner. *Quod* TOTA CURIA *concessit.*"[1]

At the time of this decision B, the old obligor, could be discharged only by a release under seal, or by an accord and satisfaction; that is, an accord fully performed. Furthermore, the action of *assumpsit* being then unknown, the new obligor must be liable, if at all, in debt. But there could be no debt in the absence of a *quid pro quo*, and A, the new obligor, received nothing in exchange for his assumption of B's obligation. The two essential features of a novation — namely, the extinguishment of the original obligation, and the creation of a new one in its place — were therefore both wanting in the case supposed. In other words, novation by simple agreement of the parties was at that time a legal impossibility.

The first step towards the modern novation is illustrated by the case of Roe *v.* Haugh[2] (1697). The count alleged that B was indebted to C in the sum of £42, and that A, in consideration that C would accept A as his debtor for the £42 in the room of B, undertook and promised C to pay him the said £42, and that C, trusting to A's promise, accepted A as his debtor. But there was no averment that C discharged B. After a verdict and judgment for C, the plaintiff, it was insisted in the Exchequer Chamber "that this was a void *assumpsit;* for except B was discharged, A could not be chargeable." Three judges were of this opinion. "But POWIS, B., NEVILL, J., LECHMERE, B., and TREBY, C. J. [thought?], that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of A, for as such it would not bind him except B was discharged; but they would construe it to be a mutual promise, viz., that A promised to C to pay the debt of B, and C on the other

[1] 1 Y. B. 11 H. VI., f. 35, pl. 30.

[2] 12 Mod. 133; 1 Salk. 29; 3 Salk. 14 s. c.

hand promised to discharge B, so that though B be not actually discharged, yet if C sues him, he subjects himself to an action for the breach of his promise."

As a consequence of the introduction of the action of *assumpsit*, there was in this case one of the marks of a novation, — the liability of a new obligor; but the other, the liberation of the old obligor, was still wanting, for the creditor might, notwithstanding his agreement, sue on the old debt. His right of action, however, must be in the long run a barren one; for whatever he recovered he must refund as damages for the breach of his promise not to sue. Equity, to prevent the scandal of two actions where there ought to be none, would have enjoined the first action; and it is not surprising that the common-law judges should ultimately have allowed the promise not to sue to operate as a legal bar, on the principle of avoiding circuity of action. In Lyth *v.* Ault,[1] a creditor of two persons agreed to take the obligation of one of them in the place of his claim against them both. PARKE, B., said, p. 674: "As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action."[2]

As soon as this final step was taken, the process of effecting a novation became extremely simple. To convert a claim of C against B into a claim of C against A it is only necessary for C and A to enter into a bilateral contract, in which C promises never to sue B, and A promises to pay to C the amount due from B. C's promise operating as an equitable release, now pleadable as a defence at law, the claim of C against B disappears, while A's promise creates in its place the new claim of C against A.

The difficulty in novation cases is therefore no longer one of law, but of fact: namely, Has the creditor entered into the bilateral contract with the new debtor? This question has come up frequently in recent times when a new corporation has acquired the assets and assumed the liabilities of an old company.[3]

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[1] 7 Ex. 669.

[2] See also Bird *v.* Gammon, 3 B. N. C. 883; Bilborough *v.* Holmes, 5 Ch. D. 255; and especially Corbett *v.* Cochran, 3 Hill, S. C. 41, where the rationale of novation is admirably described.

[3] The evidence was sufficient to establish a novation in *Re* Times Co., 5 Ch. 381; *Re* Anchor Co., 5 Ch. 632; *Re* Medical Co., 6 Ch. 362; and Miller's Case, 3 Ch. Div. 391, where accordingly the old company was discharged; and in *Re* British Co., 12

The same question arises still oftener when a partnership transfers its assets to a new firm or to an individual, and the transferee assumes the payment of the debts of the transferor.[1] And there are, of course, many other occasions when it may be desirable to bring about a substitution of debtors.[2]

We have thus far considered only novations effected by a change of debtors (*novatio debiti*). But a novation may also be accom-

W. R. 701; Burns *v.* Grand Lodge, 153 Mass. 173, where the new company was held liable to the creditor.

The novation was not proved in *Re* Manchester Association, 5 Ch. 640; Griffith's Case, 6 Ch. 374; Conquest's Case, 1 Ch. Div. 334; Blundell's Case, Eur. Ass. Arb. 39; Coghlan's Case, Eur. Ass. Arb. 31; Bristol Co. *v.* Probasco, 64 Ind. 406, where, therefore, the old company continued liable; and in *Re* Commercial Bank, 16 W. R. 958; *Re* Smith, 4 Ch. 662; *Re* Family Society, 5 Ch. 118; and *Re* India Co., 7 Ch. 651, where the new company was not chargeable.

[1] The reported cases of novation under these circumstances are legion; the following may serve as illustrations. The novation being complete, the old firm was discharged in Thompson *v.* Percival, 5 B. & Ad. 925; Lyth *v.* Ault, 7 Ex. 669; Bilborough *v.* Holmes, 5 Ch. D. 255; Ludington *v.* Bell, 77 N. Y. 138; and the transferee was charged in *Ex parte* Lane, De Gex, 300; Rolfe *v.* Flower, L. R. 1 P. C. 27; Lucas *v.* Coulter, 104 Ind. 81. On the other hand, the evidence being insufficient to establish a bilateral agreement between the creditor and the transferee of the firm, there was in the following cases no novation: Thomas *v.* Shillibeer, 1 M. & W. 124; Eagle Co. *v.* Jennings, 29 Kas. 657; Wildes *v.* Fessenden, 4 Met. 12.

[2] The mutual assent to a novation being proved, the old debtor was discharged in Brown *v.* Harris, 20 Ga. 403; Anderson *v.* Whitehead, 55 Ga. 277; Struble *v.* Hake, 14 Ill. Ap. 546; McClellan *v.* Robe, 93 Ind. 298; Foster *v.* Paine, 63 Iowa, 85; Besshears *v.* Rowe, 46 Mo. 501; Thorman *v.* Polys, 13 N. Y. Sup. 823; and the new obligor was held liable in Browning *v.* Stallard, 5 Taunt. 450; Goodman *v.* Chase, 1 B. & Ald. 297; Bird *v.* Gammon, 3 B. N. C. 883; Butcher *v.* Steuart, 11 M. & W. 857; *Re* Rotheram, 25 Ch. Div. 103, 109; Carpenter *v.* Murphree, 49 Ala. 84; Underwood *v.* Lovelace, 61 Ala. 155; Barringer *v.* Warden, 12 Cal. 311; Welch *v.* Kenny, 49 Cal. 49; Packer *v.* Benton, 35 Conn. 343; Karr *v.* Porter, 4 Houst. 297; Harris *v.* Young, 40 Ga. 65; Edenfield *v.* Canady, 60 Ga. 456; Runde *v.* Runde, 59 Ill. 98; Grover *v.* Sims, 5 Blackf. 498; Walker *v.* Sherman, 11 Met. 170; Wood *v.* Corcoran, 1 All. 405; Osborn *v.* Osborn, 36 Mich. 48; Mulcrone *v.* American Co., 55 Mich. 622; Yale *v.* Edgerton, 14 Minn. 194; Wright *v.* McCully, 67 Mo. 134; Smith *v.* Mayberry, 13 Nev. 427; Van Epps *v.* McGill, Hill & D. 109; Bacon *v.* Daniels, 37 Oh. St. 279; Ramsdale *v.* Horton, 3 Barr. 330; Corbett *v.* Cochran, 3 Hill, S. Ca. 41; Scott *v.* Atchison, 36 Tex. 76; Williams *v.* Little, 35 Vt. 323.

The fact of novation was not proved in Cuxon *v.* Chadley, 3 B. & C. 591; Wharton *v.* Walker, 4 B. & C. 163; Fairlie *v.* Denton, 8 B. & C. 395; Brewer *v.* Winston, 46 Ark. 163; Gyle *v.* Schoenbar, 23 Cal. 538; Decker *v.* Shaffer, 3 Ind. 187; Davis *v.* Hardy, 76 Ind. 272; Jacobs *v.* Calderwood, 4 La. An. 509; Jackson *v.* Williams, 11 La. An. 93; Choppin *v.* Gobbold, 13 La. An. 238; Rowe *v.* Whittier, 21 Me. 545; Curtis *v.* Brown, 5 Cush. 488; Furbush *v.* Goodnow, 98 Mass. 296; Caswell *v.* Fellows, 110 Mass. 52; Halsted *v.* Francis, 31 Mich. 113; Johnson *v.* Rumsey, 28 Minn. 531; Vanderline *v.* Smith, 18 Mo. Ap. 55; Jawdon *v.* Randall, 47 N. Y. Sup'r Ct. 374; Styron *v.* Bell, 8 Jones, N. C. 222; Jones *v.* Ballard, 2 Mill. C. R. 113; Lynch *v.* Austin, 51 Wis. 287; Spycher *v.* Werner, 74 Wis. 456.

plished by the substitution of a new creditor for an old one (*novatio nominis*). The problem is here how to convert a claim of X against Z into a claim of Y against Z. The desired result is commonly attained by two successive transactions. In the first place, X assigns to Y his claim against Z. This assignment, being legally the grant of an irrevocable power of attorney to Y to sue Z in the name of X, makes Y practically *dominus* of the claim. But it does not create a direct relation between Y and Z. Even under codes allowing Y to sue in his own name, Y is not a true successor to X.[1] Y, however, being *dominus* of the old claim against Z, may enter into a bilateral contract with Z, Y promising never to enforce the old claim in consideration of Z's direct promise to him to pay him the amount of the old claim. The promise of Y operates as an equitable release of the old claim of X against Z, and at the same time is a valid consideration for the new claim of Y against Z. The novation is therefore complete. The right of Y to bring an action in his own name against Z, independently of any statute permitting an assignee to sue in his own name, because of Z's direct promise to Y, has been almost everywhere recognized.[2] An instructive illustration of this form of novation is found in the custom by which insurance companies assent to the assignment of their policies.[3]

The practical differences between the position of an assignee of the old debt and a promisee under the new promise are considerable.

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[1] 3 Harvard Law Review, 341; see Moyle, Justinian, 466.

[2] Israel *v.* Douglas, 1 H. Bl. 239 (justly criticised, because the count was not in special *assumpsit*); Moore *v.* Hill, Peck's Add. Cas. 10; Surtees *v.* Hubbard, 4 Esp. 203; Lacy *v.* M'Neill, 4 D. & Ry. 7; Wilson *v.* Coupland, 5 B. & Al. 228; Noble *v.* Nat. Co, 5 H. & N. 225; Griffin *v.* Weatherby, L. R. 3 Q. B. 753; Tiernan *v.* Jackson, 5 Pet. 580 (*semble*); Howell *v.* Reynolds, 12 Ala. 128; Indiana Co. *v.* Porter, 75 Ind. 428; Cutters *v.* Baker, 2 La. An. 572; Lang *v.* Fiske, 11 Me. 385; Smith *v.* Berry, 18 Me. 122; Warren *v.* Wheeler, 21 Me. 484; Farnum *v.* Virgin, 52 Me. 576; Getchell *v.* Maney, 69 Me. 442, 443 (*semble*); Barger *v.* Collins, 7 Har. & J. 213; Austin *v.* Walsh, 2 Mass. 401; Crocker *v.* Whitney, 10 Mass. 316; Mowry *v.* Todd, 12 Mass. 281; Armsby *v.* Farnam, 16 Pick. 318; Bourne *v.* Cabot, 3 Met. 305; Eastern Co. *v.* Benedict, 15 Gray, 289; Blair *v.* Snover, 5 Halst. 153; Currier *v.* Hodgdon, 3 N. H. 82; Wiggin *v.* Damrell, 4 N. H. 69; Thompson *v.* Emery, 27 N. H. 269; Boyd *v.* Webster, 58 N. H. 336; Compton *v.* Jones, 4 Cow. 13; Quinn *v.* Hanford, 1 Hill, 82; Phillips *v.* Gray, 3 E. D. Sm. 69; Ford *v.* Adams, 2 Barb. 349; Esling *v.* Zantzinger, 13 Pa. 50; Clarke *v.* Thompson, 2 R. I. 146; DeGroot *v.* Darby, 7 Rich. 118; Anderson *v.* Holmes, 14 S. Ca. 162; Mt. Olivet Co. *v.* Shubert, 2 Head, 116; Wescott *v.* Potter, 40 Vt. 271, 276; Bacon *v.* Bates, 53 Vt. 30; Brooks *v.* Hatch, 6 Leigh, 534.

[3] Wilson *v.* Hill, 3 Met. 66; Fuller *v.* Boston Co., 4 Met. 206; Kingsley *v.* N. E. Co., 8 Cush. 393; Phillips *v.* Merrimack Co., 10 Cush. 350; Burroughs *v.* State Co., 97 Mass. 359; Barnes *v.* Co., 45 N. H. 21, 24.

(1) The assignee must sue subject to any set-off which the debtor may have against the assignor; the promisee under the new promise cannot be affected by any such set-off.

(2) If the old claim was in the form of a specialty, the assignee must sue in covenant, but the new promisee must sue in *assumpsit;* the period of limitation would be different accordingly in the two cases.[1]

(3) By statute in certain jurisdictions unrecorded assignments of wages are invalid against a trustee process. But the new promisee cannot be affected by these statutes, for the novation destroys the claim of the employee, so that there is nothing due to him from the employer.[2]

Although a substitution of creditors is in general to be worked out by means of an assignment of the claim and a bilateral contract between the assignee and the debtor, a *novatio nominis* may in certain cases be accomplished in a different mode. A creditor, X, who desires to make a gift to Y of his claim against Z has only to enter into a bilateral contract with Z, X promising never to sue Z, in consideration of Z's promise to him to pay the amount of the debt to Y. Y, the donee, it is true, is not the promisee; but inasmuch as the promise is made exclusively for his benefit, he should be allowed to sue upon it, if not at law, at least in equity. Even in England, where the rule denying an action to any one but the promisee is most rigidly enforced, there are several cases where the donee in the case supposed has been allowed to recover against Z.[3] The reasoning in these cases, it must be admitted, is far from satisfactory, the courts in some of them having so far lost sight of fundamental distinctions as to call Z, the debtor, a trustee.[4]

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[1] Warren *v.* Wheeler, 21 Me. 484; Compton *v.* Jones, 4 Cow. 13.

[2] Denver Co. *v.* Smeeton (Colo., 1892), 29 Pac. R. 815; Stinson *v.* Caswell, 71 Me. 510; Clough *v.* Giles, 64 N. H. 73. But see Knowlton *v.* Cooley, 102 Mass. 233; Mansard *v.* Daley, 114 Mass. 408.

[3] McFadden *v.* Jenkyns, 1 Ph. 153; Rycroft *v.* Christy, 3 Beav. 238; Meert *v.* Moessard, 1 Moo. & P. 8; Roberts *v* Roberts, 12 Jur. N. S. 971; Parker *v.* Stone, 38 L. J. Ch. 46. See also the American cases, Eaton *v.* Cook, 25 N. J. Eq. 55; Minchin *v.* Merrill, 2 Edw. 333, 339; Hurlbut *v.* Hurlbut, 49 Hun, 189. The evidence was insufficient to prove the creditor's agreement to give up his claim against the debtor in *Re* Caplen's Estate, 45 L. J. Ch. 280, and Evans's Estate, 6 Pa. Co. 437. It was decided, also, that there was no novation in Gaskell *v.* Gaskell, 2 Y. & J. 502, and Chandler *v.* Chandler, 62 Ga. 612; but these cases seem to be erroneous. The former was criticised adversely in Vandenberg *v.* Palmer, 4 K. & J. 204, 214, 215.

[4] See especially McFadden *v.* Jenkins, 1 Ph. 153; Ames, Cases on Trusts (2d ed.), 47, 48, *n.* 1.

We have hitherto dealt with the problem of novation in its simplest form. Given a debt from B to C, in what way could a new creditor be substituted in the place of C (*novatio nominis*), or a new debtor in the room of B (*novatio debiti*)? But it often happens that there are two debts at the outset, both of which it is desired to suppress in the formation of a third. A, for example, may be indebted to B, and B to C, and the three parties may wish to extinguish the claim of B against A, and that of C against B, leaving in their stead a claim of C against A. This object is easily attained at the present day. Let C enter into a unilateral contract with B, C promising never to sue B, in consideration of the assignment to C of B's claim against A. Then let C, who is now *dominus* of the claim of B against A, make a bilateral contract with A, C promising never to enforce the assigned claim against A in consideration of A's direct promise to C to pay him the amount of that claim. C's promise to B, operating as an equitable release, discharges the claim of C against B; and C's promise to A, likewise operating as an equitable release of the assigned claim of B against A, that is discharged also, and the new claim of C against A alone remains.

In the process just described, the unilateral contract between C and B precedes the bilateral contract between C and A, and the presence of all three parties is not required. But this compound novation may be effected in another mode, which does require the presence of A, B, and C, and involves the contemporaneous formation of three bilateral contracts as follows:—

(1) Between B and A, B promising to give up his claim against A for A's promise to him to pay to C the latter's claim against B.

(2) Between C and B, C promising to give up his claim against B for B's promise to give up his claim against A.

(3) Between C and A, C agreeing to give up his claim against B for A's direct promise to C to pay him the amount of that claim.[1]

In other words, each of the three makes his own promise to do the same thing, in consideration of a counter promise from each of the others. The promises not to enforce the old claims have

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[1] Since A, in the case above supposed, assumes the liability of B to C, there is a *novatio debiti*. A's promise might have taken the form of an undertaking to pay to C his own debt to B, which would have made a *novatio nominis*.

the effect of extinguishing those claims, and, as in the other process, the promise of A to pay C alone remains.[1]

The novation which results from the substitution of an obligation of A to C, in the place of the two debts of A to B and B to C, may be accomplished in still another mode, if, in addition to the change of parties, there is also a change in the form of the obligation. The parties, for example, often prefer to put the new obligation into the form of a covenant or negotiable note. In such cases, whether the novation is worked out by successive or by contemporaneous agreements, none of the agreements is bilateral. If B assigns to C his claim against A for C's promise to release B, and A subsequently gives his note or covenant to C, there is first the unilateral contract binding C to B, and afterwards A's specialty obligation to C, the giving of which forms the consideration for C's unilateral contract binding him not to enforce the assigned claim of B against A. If, on the other hand, by the contemporaneous assent of A, B, and C, A gives his note or covenant to C, we have, as before, the specialty obligation of A to C, the giving of which forms the consideration for two unilateral contracts, one with B binding him not to sue A, and one with C binding him not to sue B. It is further to be noticed that the obligation of A to C being an abstract promise to pay C a fixed amount of money, and not a concrete promise to pay C either what A owes B or what B owes C, the difference between a *novatio debiti* and a *novatio nominis* disappears in this form of novation.

This distinction between an abstract and a concrete promise is of practical importance in determining a question upon which there is much diversity of opinion among Continental writers, namely: To what extent may A urge against C, suing on the new obligation, defences which were open to A against B, or to B against C, on the old and extinguished obligations?

This question may be best answered by considering separately the typical cases of novation.

(1 *a.*) A promises C to pay him what A owes B, for C's promise to release B, or, in case B has assigned to C his claim against A,

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[1] Illustrations of a novation where two debts are extinguished may be found in Fairlie *v.* Denton, 8 B. & C. 395; Cochrane *v.* Green, 9 C. B. N. S. 448; Barniger *v.* Warden, 12 Cal. 311; Lester *v.* Bowman, 39 Iowa, 611; Finan *v.* Babcock, 58 Mich. 301; Heaton *v.* Angier, 7 N. H. 397; Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 16 N. H. 580; Cotterill *v.* Stevens, 10 Wis. 422; Cook *v.* Barrett, 15 Wis. 596.

for C's promise not to enforce the assigned claim. If A had a defence against B, and so was not liable to him, by the very tenor of his promise he cannot be charged by C. If, on the other hand, A had no defence against B, but B had a defence against C, A must perform his promise. For A, having been released from his debt to B, has no answer to an action on his promise to C. C, however, because of the failure of consideration between him and B, must hold his promise as a constructive trustee for B.

(1 *b*.) A gives his note to C upon the understanding that B's claim against A, and C's claim against B, are to be extinguished. If, as before, A was not liable to B, he must nevertheless pay the note to C; for C confessedly has the legal title to the note, and having taking it in the course of business, holds it free from all equities in favor of A.[1] If, on the other hand, A had no defence against B, his promise to C is binding, although B had a defence against C. C, however, will be a constructive trustee of the note for B, as in the case of the bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.

(2 *a*.) A promises C to pay him what B owes C, for C's promise to release B. If B had a defence against C, and so was not liable to him, A by the terms of his promise is not liable to C. If, on the other hand, B had no defence against C, but A had a defence against B, A must pay C. For C having given up his claim against B for A's promise to him, must be entitled to enforce it free from any equities in favor of A.[2]

(2 *b*.) A gives his note to C upon the understanding that the debt of A to B, and of B to C, are to be cancelled. If, as before, B was not liable to C, A must nevertheless pay his note.[3] C has the legal title to the note, and A, having obtained the release of his debt to B, has obviously no equitable defence. C, however, although he has the legal title to the note, must hold it, or its proceeds when collected, in trust for B; for the consideration having failed as between him and B, he would be unjustly enriching himself at B's expense if he were allowed to retain the note for his own benefit. If, on the other hand, B had no defence against C, but A had a defence against B, A must pay C as in the case of the

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[1] See Eastern Co. *v.* Benedict, 15 Gray, 289.

[2] Edenfield *v.* Canady, 60 Ga. 456.

[3] Keller *v.* Beaty, 80 Ga. 815; Bearce *v.* Barstow, 9 Mass. 44; Adams *v.* Power, 48 Miss. 450; Abbott *v.* Johnson, 47 Wis. 239.

bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.[1]

Still another phase of novation has been the source of much controversy. If the debt of A to B, or that of B to C, was secured by a mortgage, or by the undertaking of a surety, will the benefit of the mortgage or the suretyship survive to C, after the extinguishment of the old debts and the creation of the new one of A to C, in the absence of a specific agreement to that effect? C, it is submitted, should have the benefit of the mortgage in all cases but one; he should also be allowed to charge the surety where there is a *novatio nominis*, but not where there is a *novatio debiti*.

If A's debt to B is secured by mortgage, and B assigns his claim to C without mention of the mortgage, C, it is everywhere agreed, is entitled in equity to the benefit of the security. A, not having paid the debt, cannot, of course, re-enter or call for a reconveyance; B, though holding the legal title of the mortgage, cannot hold it for himself, for he has transferred the claim to secure which it was given; the land mortgaged cannot remain locked up; equity, therefore, turns B into a constructive trustee for the person who in natural justice is best entitled to it, that is, C, the assignee of the claim. If C now undertakes not to enforce this assigned claim of B against A in consideration of A's direct promise to pay him, there is no reason why the constructive trust in favor of C should not continue. It is still true that A has not performed the condition entitling him to re-enter or call for a reconveyance. Although he cannot be sued upon the old debt, he has not *paid* it.

The result is the same, and for similar reasons, when without any assignment A promises to pay C what he owes B, in return for C's promise to release B, and at the same time makes a similar promise to B for B's promise to release A. As before, A is no longer liable on his old debt to B, but he has not *paid* that debt. A, therefore, cannot recover the legal title from B, nor can B keep it for himself, having no longer the claim against A. He must, therefore, in justice hold the mortgage for C, who has, in effect, succeeded to B's claim against A.

If, again, the debt of B to C was secured by a mortgage, and A promises to pay C that debt, for C's promise not to sue B, C's right

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[1] Dever *v.* Atkin, 40 Ga. 423; Gresham *v.* Morrow, 40 Ga. 487; Morris *v.* Whitmore, 27 Ind. 418.

to the mortgage is still clearer.[1] B, though no longer liable to an action on the old debt to C, has not performed the condition of the mortgage by *payment.* C is as much entitled to retain the mortgage as a mortgagee who cannot sue the mortgagor because the debt is barred by the Statute of Limitations.

But if, on the other hand, the debt of A to B was secured by mortgage, and A promises to pay C, not that debt, but the unsecured debt of B to C, the mortgage will not survive the novation. B, as before, having no right to sue A, cannot keep the mortgage for his own benefit. Nor is there any ground for making B a constructive trustee for C. For in this case it is not C who succeeds to B's secured claim against A, but A who succeeds to B's unsecured duty to C. Since, then, neither B nor C is entitled to the mortgage, equity should treat it as extinguished.

If, finally, X was a surety for A to B, the substitution of A's liability to C for his former liability to B (*novatio nominis*) ought not to affect the liability of X. A's liability continues in substance the same as before, and X is in no way prejudiced by a change of creditors. The case is, in effect, the same as if B had assigned his claim against A to C. C would thus become *dominus* of the claim against A, and no one would assert that in such a case X would be discharged.[2]

But if X was a surety for B to C, and C agrees to discharge B in consideration of A's promise to pay B's debt to C (*novatio debiti*), X, the surety, is also released; for it would be an utter perversion of X's contract to hold him as surety for A when he in fact became surety for B alone.

J. B. Ames.

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[1] Foster *v.* Paine, 63 Iowa, 85; see also 74 Wis. 456. It is by the same principle that a change in the form of a debt secured by mortgage does not affect the mortgagee's right to the security. 1 Jones, Mortgagees (4th ed.) § 924.

[2] Black *v.* De Camp, 78 Iowa, 718.